NO. 43831-0-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

GERALD WILLIAMS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable George N. Bowden, Judge

BRIEF OF APPELLANT

DANA M. NELSON
Attorney for Appellant

NIELSEN, BROMAN & ASSOCIATES
810 - 3rd Ave., Suite 320
Seattle, WA 98104
(206) 623-2373

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A. ASSIGNMENTS OF ERROR

1. Appellant received ineffective assistance of counsel.

2. The trial court erred in denying appellant's motion for a new trial based on his trial attorney's failure to request a "No Duty to Retreat" instruction.

3. The trial court erred in admitting evidence of prior misconduct, where it did not relate to appellant's character for truthfulness.

Issues Pertaining to Assignments of Error

1. Was appellant entitled to a "no duty to retreat" instruction where the complaining witness allegedly threatened appellant with a knife while he was driving; and (b) upon pulling over, appellant made no attempt to exit the vehicle, but rather responded by pulling out his own knife? (Assignments of Error 1, 2)

2. Was appellant deprived of effective assistance of counsel by his attorney's failure to request a "no duty to retreat" instruction where, absent the instruction, a reasonable juror could have concluded that flight was a reasonably effective alternative to appellant's use of force?

(Assignments of Error 1, 2).

3. Did the trial court err in allowing the state to impeach appellant by showing that his admitted drug usage was a current parole violation? (Assignment of Error 3).

B. STATEMENT OF THE CASE

1. Procedural Facts

On December 17, 1997, the Snohomish County Prosecutor charged appellant, Gerald Williams, with second degree assault -- with a deadly weapon allegation -- for allegedly assaulting David Conklin with a knife having a blade longer than three inches. CP 281; RCW §§ 9.94A.125, 9.94A.310(4), 9A.36.021(c). On February 25, 1998, the state amended the information to include an alternate charge of first degree assault. CP 269; RCW 9A.36.011(1)(a).

At trial, the state proposed and the court adopted WPIC 17.02 to instruct the jury on the use of lawful force:

> It is a defense to a charge of assault that the force used was lawful as defined in this instruction.
>
> The use of force upon or toward the person of another is lawful, when used by a person who reasonably believes that he is about to be injured or by someone

> lawfully aiding a person who he reasonably believes is about to be injured, in preventing or attempting to prevent an offense against the person, and when the force is not more than is necessary.
>
> The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of and prior to the incident.
>
> The State has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

CP 260 (Instruction 14, emphasis added); Supp. CP __ (sub. no. 40, State's Supplemental Instructions, 2/25/98).

The state further proposed and the court adopted WPIC 16.05 to instruct the jury regarding when "the force" used is considered "not more than necessary."

> Necessary means that no reasonably effective alternative to the use of force appeared to exist and that the amount of force used was reasonable to effect the lawful purpose intended, under the circumstances as they reasonably appeared to the actor at the time.

CP 261 (Instruction 15, emphasis added); Supp. CP

__ (sub. no. 40, State's Supplemental Instructions, 2/25/98). Defense counsel did not propose a "No Duty to Retreat" instruction.[1] 5RP 290-96.[2]

After a jury trial, Williams was acquitted of first degree assault, but convicted of second degree assault with a deadly weapon finding. CP 239-241. Prior to sentencing, Williams wrote to the trial judge indicating his intent to move for a new trial based on ineffective assistance of

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[1] The Washington Pattern "No Duty to Retreat" instruction provides:

> It is lawful for a person who is in a place where that person has a right to be and who has reasonable grounds for believing that he is being attacked to stand his ground and defend against such attack by the use of lawful force. The law does not impose a duty to retreat.

WPIC 16.08.

[2] This brief refers to the transcripts as follows: "1RP" - trial call 2/13/98; "2RP" - continuance entered 2/13/98; "3RP" - continuance entered 2/20/98; "4RP" - trial held 2/25-26, 1998; "5RP" - trial held 2/27-3/2, 1998; "6RP" - defense counsel's motion to withdraw 4/3/98; "7RP" - motion for new trial scheduling hearing 5/1/98; "8RP" - scheduling hearing 6/2/98; "9RP" - (a) hearing regarding scope of Williams' waiver of attorney-client privilege 7/16/98, and (b) state's motion to interview defense witnesses 11/3/98; and "10RP" - (a) hearing on motion for new trial 11/5-6, 1998, and (b) motion for new trial on supplemental grounds and sentencing 11/17/98.

counsel. CP 226-237. As a result, Williams' attorney, John Crowley, was allowed to withdraw and new counsel, Mickey Krom, appointed. CP 225.

Although Williams thereafter moved for a new trial raising numerous issues, the motion was denied. CP 102-120, 121-65, 172-89, 204-13; Supp. CP __ (sub. no. 112, Findings of Fact and Conclusions of Law regarding Defendant's Motion for New Trial, 11/17/98); 10RP 150-60. At sentencing on November 17, 1998, Williams moved for reconsideration, asserting that Crowley was ineffective for failing to request a "No Duty to Retreat" instruction. CP 62-69; 10RP 162. In denying the motion, however, the court found that the additional instruction would not have effected the outcome of the trial, and that the failure to propose the instruction was not prejudicial error. 10RP 163.

The court subsequently sentenced Williams to a 96-month standard range term of confinement, including the weapons enhancement. CP 45. This appeal timely follows. CP 3-14.

2. Substantive Facts

Gerald Williams and David Conklin were acquaintances who frequented the same "crack house"

on 25th and Grand in Everett. 4RP 38; 5RP 159. During the early morning hours of December 14, 1997, both men were at the house on Grand and had been up for several days smoking crack cocaine. 5RP 162, 194.

What happened next is disputed. Williams testified he asked Conklin to go to the store to get some food. 5RP 164. As Williams handed $10 to Conklin for groceries, however, Conklin allegedly pulled a knife and robbed Williams of the entire $50 he held wadded in his hand. 5RP 166. In contrast, Conklin claimed Williams voluntarily gave him the money to buy more drugs. Conklin nevertheless admitted he stole the money by not returning thereafter. 4RP 45-46.

At approximately 1:00 a.m. the next morning, Williams drove with Michael Linear and Deborah Montez to the Chevron station at the intersection of Broadway and Pacific Street to get gas and cigarettes. 5RP 170-71, 201. He noticed Conklin walking on the opposite side of the street. 5RP 171-72. Williams claimed Conklin asked him for a ride because he was high and had just been stopped

by the police.[3] 5RP 172. With Linear in the front passenger seat, Montez in the back driver-side seat, and Conklin in the back passenger-side seat, Williams drove south on Broadway toward the I-5 on-ramp. 4RP 51-52; 5RP 173.

As they drove down Broadway, Conklin and Williams argued about the $50. 4RP 52-53; 5RP 173. According to Conklin, Williams suddenly pulled out a knife, turned toward the backseat, and stabbed him in the head. 4RP 53-55. Conklin claimed he tried to get as close to the door as possible, but Williams repeatedly stabbed him in the arm and then the leg. 4RP 56. Conklin testified that the stabbing took place as Williams drove south on Broadway past "Jackpot." 4RP 56, 91-92. According to Conklin, when Williams approached the 1-5 on-

[3] Conklin's statement to police also indicates he asked Williams for a ride. Supp. CP __ (sub. no. 115, Letter to Judge Bowden, 11/20/98), attached Probable Cause Statement. At trial, however, Conklin claimed Williams told him to get in the car. 4RP 52. Conklin nevertheless acknowledged that he had been smoking crack and drinking beer all day, and that the police stopped the taxi in which he was riding shortly before encountering Williams. 4RP 47, 51. Officer John Sparks testified that he stopped Conklin's taxi less than an hour before the incident between Williams and Conklin. 4RP 111.

ramp, he pulled over and pushed Conklin out of the car. 4RP 57.

In contrast, according to Williams, nothing happened until the car actually reached the I-5 on-ramp.[4] 5RP 174-75. Williams testified that someone in the car suddenly asked Conklin, "what are you doing in that pocket?" 5RP 174. Knowing that Conklin kept a knife in his pocket[5] and recalling the robbery the previous morning, Williams felt afraid. 5RP 175, 179, 181, 215. He pulled over and grabbed his own knife that was positioned on the seat next to him. 5RP 175, 177. Before Conklin was able to open his knife, Williams turned around and, with his left hand, grabbed Conklin's right hand -- which held the knife -- and pinned it against the car window. 5RP 181. Although Williams testified he had control of Conklin's right hand, he testified he was still frightened

[4] Despite Conklin's trial testimony, Conklin's previous statement to police similarly indicated that the incident did not occur until after Williams pulled over at the I-5 on ramp. 4RP 118.

[5] Conklin admitted he carried a folding buck knife in his pants' pocket that night, but denied using it. 4RP 72, 85, 90.

because Conklin was struggling and attempting to open his knife. 5RP 182-83, 186, 215.

As a result, Williams used his own knife to "poke" Conklin's left arm.[6] 5RP 183, 185. Williams claimed he was just trying to get Conklin to exit the car. 5RP 183-85. Conklin was reportedly not responding to Williams' requests, however, and continued to struggle. 5RP 182-84. Williams thought the cocaine had numbed Conklin's body to a point where he could not feel the knife poking him.[7] 5RP 184. To get Conklin's attention, Williams testified he poked him again -- this time more deeply -- in the arm and leg. 5RP 184-85, 217-18. Conklin finally exited the vehicle when Williams poked him in the head. Although the cut was superficial, it bled profusely.[8] 4RP 56; 5RP 188,

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[6] Although Conklin testified that Williams stabbed him first in the head, Conklin's statement to police corroborates that Williams stabbed him first in the arm. 4RP 93.

[7] Dr. David Walters corroborated that cocaine does have a numbing effect on the body. 5RP 248. Williams himself had a broken hand but didn't feel it as a result of his cocaine use. 4RP 122-23; 5RP 180.

[8] Dr. Walters described the head wound as a "small laceration." 5RP 228. Three of the wounds on Conklin's left arm were approximately 1" deep,

228.

Linear remembered the incident differently from both Conklin and Williams. Linear testified that Conklin and Linear were arguing about the $50, but that by the time the car drove past "Jackpot," the situation had calmed. 5RP 271-72. According to Linear, Williams suddenly "snapped" and turned around and hit Conklin; Linear admitted he did not actually see Williams make contact, however. 5RP 264, 272. Linear did not hear anyone say "Little D[9] has a knife," but Linear admitted he could not see whether Conklin had a knife. 5RP 274-76. Nor did Linear see Williams' knife positioned on the front seat. However, Linear was certain Williams did not grab his knife until the car was pulled over. 5RP 279. Consistent with Williams' testimony, Linear heard Williams tell Conklin to get out of the car several times during the incident. 5RP 278.

3. Facts Relating to "Prior Bad Acts" Evidence

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and the leg wound was probably 2-3" deep. 5RP 228-229. Dr. Walters testified, however, that all the wounds taken together were not very serious. 5RP 244, 246.

[9] "Little D" was Conklin's nickname. 5RP 171-72.

Before Williams testified, the state moved in limine to admit several prior felony and misdemeanor convictions to impeach his credibility. 5RP 145-48. Defense counsel did not dispute the admissibility of these convictions. 5RP 146-47. The prosecutor did not indicate any intent to impeach Williams with uncharged parole violations.

On direct, Williams testified that he was a crack addict, and that he was released from prison two weeks before the confrontation with Conklin. 5RP 158-59, 196. Williams asserted his desire to stay out of prison was one reason why he did not instigate the fight with Conklin or try to seriously hurt him. 5RP 174, 184.

After going through Williams' various convictions on cross-examination, the prosecutor asked Williams:

> Q: Now, you testified on direct that you had just been out of prison for a couple weeks when this happened?
>
> A: Yes.
>
> Q: And it was important for you not to go back to prison?
>
> A: Most definitely.
>
> Q: Was it true that one of the conditions of being released or on supervision

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5RP 192. Defense counsel objected and a sidebar followed, enabling the prosecutor to disclose her question to the court outside the presence of the jury. When court resumed, the prosecutor was allowed to proceed over defense counsel's objection. 5RP 192-93.

> Q: Mr. Williams, is it true that one of the conditions of your probation or being released from prison was not to possess or use controlled substances?
>
> A: Yes.
>
> Q: If you got caught doing that, you can go back to prison?
>
> A: Maybe ten -- thirty days, go to jail for five or ten days maybe.
>
> Q: Yet within two weeks of being released from prison you were back in a crack house using cocaine?
>
> A: I'm addicted to drugs.

5RP 193.

C. ARGUMENT

1. DEFENSE COUNSEL WAS INEFFECTIVE IN FAILING TO REQUEST A "NO DUTY TO RETREAT" INSTRUCTION.

Both the federal and state constitutions guarantee the right to effective representation. U.S. Const. Amend. 6; Const. art. 1, § 22 (amend. 10); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). To prevail on a claim of ineffective assistance of counsel, counsel's representation must have been deficient, and the deficient representation must have prejudiced the defendant. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999) (citing Strickland v. Washington, 466 U.S. 668, 687, 686, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)).

Counsel's performance is deficient if it falls below an objective standard of reasonableness. State v. Maurice, 79 Wn. App. 544, 551-52, 903 P.2d 514 (1995). Where counsel's trial conduct cannot be characterized as legitimate trial strategy or tactics, it constitutes ineffective assistance. Maurice, at 552.

A defendant suffers prejudice where there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland , 466 U.S. at 694. A "reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland , at 694.

a. Counsel's Performance was Deficient.

A defendant is denied effective assistance of counsel where his attorney fails to request an instruction that is supported by the evidence and

helpful to the defense. See State v. Thomas, 109 Wn.2d 222, 226-29, 743 P.2d 816 (1987) (counsel ineffective for failing to offer instruction regarding defendant's mental state where defendant was charged with felony flight and defense was intoxication). Here, trial counsel was ineffective for failing to propose a "no duty to retreat" instruction.

It has long been the law in Washington that a person has no duty to retreat where he is assaulted in a place where he has a right to be. State v. Allery, 101 Wn.2d 591, 598, 692 P.2d 312 (1984). A defendant is entitled to a "no duty to retreat" instruction whenever there is sufficient evidence in the record to support it. Allery, 101 Wn.2d at 598 (citing State v. King, 92 Wn.2d 541, 599 P.2d 522 (1979)).

Under circumstances analogous to Williams' case, this Court has found the failure to give a "no duty to retreat" instruction to be prejudicial error. State v. Wooten, 87 Wn. App. 821, 826, 945 P.2d 1144 (1997); State v. Williams, 81 Wn. App. 738, 744, 915 P.2d 738 (1996). Williams involved an appeal by codefendants Charles and Nalen

Williams from convictions for felony murder. Williams, 81 Wn. App. at 739.

At trial, Charles testified that while he was standing in the street, the decedent, Joseph Wade, threatened him with a knife. Charles responded by grabbing a shovel, advancing on Wade, and then backing away. Charles' brother, Nalen, then arrived on the scene and took the shovel. Now disarmed, Charles left and grabbed a pitchfork. When he returned, Nalen and Wade were "going back and forth, like facing off each other." Charles repeatedly hit Wade's hands in an attempt to disarm him. According to Charles, Nalen killed Wade when he hit him in the back of the head with the shovel. Nalen claimed it was Charles who delivered the fatal blow. Williams, 81 Wn. App. at 740.

The trial court instructed the jury that self defense is justified only when the force used "is not more than necessary." Williams, 81 Wn. App. at 741. The court also instructed the jury that force was "necessary" only where no "reasonably effective alternative to the use of force appeared to exist and that the amount of force was reasonable to effect the lawful purpose intended . . . ."

Williams, 81 Wn. App. at 741. The court denied the defendants' request for a "no duty to retreat" instruction. Williams, 81 Wn. App. at 741.

This Court reversed. In doing so, it repeated the long-standing rule that "[f]light, however reasonable an alternative to violence, is not required" in Washington. Williams, 81 Wn. App. 743-44. Citing Allery, this Court emphasized that a defendant is entitled to a "no duty to retreat" instruction whenever the "evidence supports a finding that the defendant was assaulted in a place where the defendant was lawfully entitled to be." Williams, 81 Wn. App. at 742; accord Wooten, 87 Wn. App. at 825.

Williams was entitled to such an instruction. According to his testimony, Conklin pulled a knife from his pocket while Williams was driving down Broadway. In light of the earlier robbery, Williams was afraid Conklin was preparing to stab him. Moreover, Williams was entitled to remain in his car -- he had every right to stand his ground rather than flee from the vehicle. Had he requested a "no duty to retreat" instruction, the court would have been required to give it. Defense

counsel's performance was therefore deficient in failing to request the instruction. See Thomas, 109 Wn.2d at 226-29.

b. Williams Suffered Prejudice

This Court recognized in both Wooten and Williams that the failure to instruct the jury regarding the absence of a duty to retreat raised the possibility that the jury rejected the defendant's claim of self-defense on improper grounds. As explained in Williams:

> In the absence of the "no duty to retreat" instruction, a reasonable juror could have believed Charles, or Nalen, or both, but could have erroneously concluded that the brothers used more force than was necessary because they did not use the obvious and reasonably effective alternative of retreat. Thus, we clarify the rule, and hold that where a jury may conclude that flight is a reasonably effective alternative to the use of force in self-defense, the no duty to retreat instruction should be given.

Williams, 81 Wn. App. at 744. Because there was a possibility that the jury erroneously concluded that the Williams brothers' failure to retreat resulted in excessive force, this Court refused to find the error harmless. Williams, 81 Wn. App. at 744; accord Wooten, 87 Wn. App. at 826.

Williams is soundly reasoned and demonstrates

the degree of prejudice to appellant. As in Williams, the jury here was instructed that self-defense is justified only when the force used "is not more than necessary." CP 260. As in Williams, the jury was instructed that force was "necessary" only where "no reasonably effective alternative to the use of force appeared to exist." CP 261. And, as in Williams, the absence here of a "no duty to retreat" instruction raised the possibility that a reasonable juror may have found that Williams otherwise acted reasonably, but nonetheless used excessive force because he never used the obvious and reasonably effective alternative of retreat.

The possibility is as strong here as in Williams because Williams certainly had the opportunity to flee. Williams testified he immediately pulled over when someone in the car asked Conklin what he was taking from his pocket. Williams also testified that he knew Conklin carried a knife in his pocket and that Conklin had earlier used it to rob Williams. Conklin even admitted at trial that he was carrying a knife that night. Therefore, a reasonable juror could have believed that Williams was about to be assaulted.

However, the same juror could have erroneously concluded that Williams' subsequent use of force was excessive because he chose to defend himself rather than exit the vehicle as soon as he pulled over. As a result, there is a reasonable probability that, absent trial counsel's failure to request the "no duty to retreat" instruction, the outcome of trial would have been different. This probability undermines confidence in the outcome of the trial and requires that Williams' conviction be reversed.

2. THE TRIAL COURT ERRONEOUSLY ALLOWED THE STATE TO IMPEACH WILLIAMS WITH IMPROPER EVIDENCE OF PRIOR MISCONDUCT.

Over defense counsel's objection, the prosecutor was permitted to inquire as to whether Williams' drug usage was a current parole violation. Because Williams' alleged parole violation did not relate to his character for truthfulness, the court abused its discretion.

Under ER 608[10], evidence of prior misconduct is

[10] ER 608 provides in part:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as

admissible only if probative of a witness' character for truthfulness.[11] Drug possession and use are not probative of truthfulness because they have little to do with a witness' credibility. State v. Stockton, 91 Wn. App. 35, 42, 955 P.2d 805 (1998) (citing State v. Benn, 120 Wn.2d 631, 651, 845 P.2d 289, cert. denied, 510 U.S. 944 (1993)). This is particularly true where the jury has heard evidence about other convictions that are per se probative of truthfulness. Stockton, 91 Wn. App. at 42 (citing State v. Millante, 80 Wn. App. 237,

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> provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

[11] Under ER 404(b), other crimes, wrongs or acts may be admissible as proof of motive, lack of mistake, etc. The court did not treat Williams' alleged parole violation as 404(b) evidence, however. The court did not identify a proper purpose for the evidence, or balance its probative value against its prejudicial effect, as required by the rule. See, e.g., State v. Dawkins, 71 Wn. App. 902, 908-09, 863 P.2d 124 (1993).

247, 908 P.2d 374 (1995), rev. denied, 129 Wn.2d 1012 (1996)).

Whether Williams violated the terms of his release by smoking cocaine was not in any way relevant to his character for truthfulness. The Washington Supreme Court has held that drug convictions are not probative of truthfulness under ER 609. State v. Hardy, 113 Wn.2d 701, 706-08, 946 P.2d 1175 (1997). Logic dictates that alleged parole violations for drug use should similarly be held irrelevant under ER 608. Although Williams himself testified he had been recently released from prison and had been smoking cocaine regularly since, he did not testify that he was breaking parole by doing so. His direct testimony did not therefore open the door to the prosecutor's inquiry. See Stockton, 91 Wn. App. at 40 (a passing reference to a matter arguably related to prior misconduct does not open the door for the state to cross-examine about the prior misconduct). Moreover, Williams had already testified to numerous convictions that were per se probative of truthfulness under ER 609. The alleged probation violation was therefore cumulative and unfairly prejudicial. See Stockton, at 42. The trial court erred in overruling defense counsel's objection to

this inquiry.

The court's error was not harmless because the otherwise inadmissible evidence likely affected the jury's verdict. Stockton, at 43. By eliciting the fact that Williams was prohibited from using or possessing drugs as a condition of release, the prosecutor essentially told the jury Williams was not only a law-breaker, but a repeated law-breaker. The jury was likely left with the impression that Williams would probably do anything for drugs -- even stab someone for drug money. Moreover, the alleged parole violation may have caused the jury to doubt Williams' testimony when he asserted that he did not instigate the fight with Conklin out of fear of returning to prison. Such a doubt likely affected the jury's assessment of Williams' claim of self-defense. This court should therefore reverse. D. CONCLUSION

For the reasons stated above, this Court should reverse Williams' conviction.

DATED this ____ day of August, 1999.

Respectfully submitted,

NIELSEN, BROMAN & ASSOCIATES

DANA M. NELSON, WSBA 28239
Office ID No. 91051

Attorneys for Appellant